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pricing problems

MOTOR FUEL PRICING PROBLEM

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Motor fuel pricing problems : a report to



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MOTOR FUEL PRICING PROBLEMS

A Report to the 52nd Legislature
from the
Joint Interim Subcommittee
on Marketing of Motor Fuels

As Required By
House Joint Resolution No. 12
51st Legislature

Prepared by Paul E. Verdon, Staff Researcher

Montana Legislative Council
Room 138, State Capitol
Helena, MT 59620

October 1990

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HOUSE JOINT RESOLUTION NO. 12

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF THE SYSTEM OF MARKETING MOTOR FUELS IN MONTANA TO DETERMINE IF SUBSIDIZED PRICING AND PREDATORY MOTOR FUEL FRANCHISE PRACTICES GIVE UNFAIR COMPETITIVE ADVANTAGE TO CERTAIN WHOLESALERS AND RETAILERS; AND REQUIRING A REPORT OF THE STUDY'S FINDINGS TO THE 52ND LEGISLATURE.

WHEREAS, independent and small dealers and distributors of petroleum and related products, who are vital to a healthy, competitive marketplace, are unable to survive subsidized pricing and predatory motor fuel franchise practices at the wholesale and retail levels by other wholesalers and retailers who have other sources of income; and

WHEREAS, subsidized pricing and predatory motor fuel franchise practices are not conducive to fair trade; and

WHEREAS, laws prohibiting those practices are effective in protecting independent and small retailers and wholesalers in other jurisdictions; and

WHEREAS, a decision on whether a law prohibiting those practices is needed in Montana depends upon a determination that a problem of subsidized pricing and predatory motor fuel franchise agreements in the motor fuels industry does exist in Montana and upon the extent of the problem.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That an appropriate interim committee be assigned to study the marketing of motor fuels in Montana to determine if there exist discriminatory or predatory systems of pricing or motor fuel franchise agreements in which independent wholesalers and retailers are unfairly burdened with higher costs than competing wholesalers and retailers owned by or affiliated with companies that also own production facilities and distribution systems.

BE IT FURTHER RESOLVED, that if the interim committee determines that discriminatory or predatory practices are indeed subjecting independent Montana wholesalers and retailers to unfair competition from other wholesalers and retailers who benefit from those practices, the interim committee prepare legislation to remedy the problem of unfair competition caused by those practices.

BE IT FURTHER RESOLVED, that the interim committee report in writing to the 52nd Legislature and submit proposed remedial legislation if the interim committee determines that legislation is necessary.

BACKGROUND OF THE STUDY

The 51st Legislature on March 21, 1989, approved House Joint Resolution No. 12, which requested an interim study of the system of marketing motor fuels in Montana to determine if subsidized pricing and predatory motor fuel franchise practices give unfair competitive advantage to certain wholesalers and retailers.

The results of the poll of legislators following adjournment of the 1989 regular session ranked HJR 12 as third in priority among all studies requested. Because of limited funding and demands on staff time, the Legislative Council decided at the opening of the interim to create only two interim committees. At the beginning of calendar 1990, the evolution of the Council staff work load and pattern caused the staff to recommend creation of a third study committee, and the Legislative Council, at its meeting on January 20, 1990, approved the study under HJR 12 because of its superior priority to the remaining proposed studies. Creation of the Joint Interim Subcommittee on Marketing of Motor Fuels resulted.

The need for the study resulted from profound changes in the marketing of motor fuels that occurred during the 1970s and 1980s, an era of skyrocketing gasoline prices and of the mass exodus of independent dealers from the retail motor fuel trade. Many neighborhood corner service stations disappeared as independent businesses succumbed to the uncertainties of an environment controlled by forces beyond the state's and even the nation's borders. These changes were manifest in the departures of at least three major oil companies from the Montana business scene. Evidence of the changes in the motor fuel business stand throughout Montana in former service stations converted to house optometrists, real estate brokers, insurance agents, and other professional or financial offices. Among other service stations, survival turned on converting formerly "full service station" lubrication bays and repair stalls into "convenient store" grocery shelves and refrigeration cases.

Pervasive among former and current service station operators and bulk distributors is a belief that the demise of their businesses is attributable to unfair pricing or discriminatory practices employed by refiners or suppliers who provide product to company-affiliated or company-owned retailers or wholesalers at lower prices or on more favorable terms. Many independent dealers believe that their major company-owned competitors enjoy undue advantages.

Following the lead of the State of Washington, which enacted service station owners' protective legislation four years ago, Montana legislators in 1987 and 1989 offered bills to protect Montana's independent motor fuel dealers. Those measures did not survive the legislative process.

Existing Prohibitions

Montana's laws are not completely silent on the subject of discriminatory pricing of motor fuels. Title 82, chapter 15, part 2, Montana Code Annotated, first enacted in 1935, makes discrimination in the pricing of petroleum products a misdemeanor subject to a maximum fine of \$500. The law also allows civil suits for actual and exemplary damages.

Those who perceive themselves to be victims of discriminatory practices believe the existing law is not an effective remedy.

RESULTS OF STUDY ACTIVITIES

From its belated inception, the Joint Interim Subcommittee on Marketing of Motor Fuels embarked on a schedule that included four meetings. Three of the meetings were devoted to receiving information from all elements of the motor fuels industry, the Subcommittee staff, and state agencies concerned with administration and enforcement of unfair trade practices, consumer protection laws, and, more specifically, Montana's motor fuel price law.

While recognizing that dealers in motor fuels may face circumstances that are unique to their business, the Subcommittee confronted a problem of developing remedial legislation not inimical to the existing state laws regulating the relationships among suppliers, dealers, and consumers.

In order to understand the scope of the existing legal protections for businesses and consumers, the Subcommittee requested and received from the Attorney General the viewpoint of the Department of Justice on the problems of enforcement and prosecution. The Department of Commerce likewise responded to a Subcommittee request with a statement from its chief legal counsel accenting the limitations it faces in administering the existing laws and the challenges presented by expanded statutes.

Recommendations

After carefully considering the testimony heard and the information presented, by majority vote, the Subcommittee recommended two bills for introduction in and passage by the 52nd Legislature:

LC 36 (see Appendix A) to regulate the price of motor fuel at the wholesale and retail levels and to prohibit below-cost sales of motor fuels.

LC 39 (see Appendix B) to create a Montana version of the federal Robinson-Patman Anti-Discrimination Act that prohibits a business from discriminating in price between purchasers of commodities of like grade and quality if the effect is to lessen competition or to tend to create a monopoly and to include language in the bill to require Montana courts to give "due consideration and weight" to the interpretations of the Federal Trade Commission and the federal courts.

Proposals Received: No Further Consideration

In addition to LC 36 and LC 39, the Subcommittee at its second meeting requested that three other draft bills be prepared for its consideration. At the meeting on August 9, the staff presented these draft bills:

LC 37 would permit a franchised motor fuel retailer to purchase branded motor fuel from any supplier of that brand.

LC 38 would establish a gasoline dealer bill of rights similar to a law enacted in the State of Washington in 1986.

LC 40 would require the divorcement of refining and marketing segments of the motor fuel industry.

After reviewing the provisions of the bills, the Subcommittee decided to give no further consideration to LC 37, LC 38, or LC 40.

*Example of Survey Questionnaire Circulated
To Oil Companies in February 1990*

INFORMATION QUESTIONNAIRE
For Voluntary Response
To Determine Existence of or Extent of Problem

To assist the Subcommittee, each motor fuel refiner and any other person or organization participating in the marketing of motor fuels was requested to provide the following information about its operations in Montana:

[As used in this document, "company" means an integrated organization (or its predecessor) that owns and operates refining, transportation, and marketing facilities with its own employees or with franchisees or independent dealer-contractors.]

	<u>1975</u>	<u>1988</u>
(1) Number of locations at which petroleum was offered for sale at retail in Montana:		
Company-owned and operated	_____	_____
Company-owned, leased to dealer	_____	_____
Dealer-owned, franchised	_____	_____
Other arrangements	_____	_____
Total retail dealers	_____	_____
(2) Competitive situations		
Number of locations in which company-owned and operated stations competed directly with dealer-owned or dealer-leased stations in the same community which were dependent on same source of supply	_____	_____

[If answers to the above questions are not available for 1975, please provide information for the earliest year after 1975 and indicate the year]

(3) Cost of unleaded regular gasoline delivered to dealers in competitive

situations on January 31, 1990:

To company-operated station _____ per gallon

To dealer-owned station _____ per gallon

To dealer-leased station _____ per gallon

Under other special arrangements _____ per gallon

- (4) Posted pump prices of unleaded regular gasoline in competitive situations on January 31, 1990

At company-operated station _____ per gallon

At dealer-owned station _____ per gallon

At dealer-leased station _____ per gallon

Under other special arrangements _____ per gallon

- (5) Gross margin on gasoline necessary for independent dealer to recover operating and overhead expenses and generate a reasonable survival profit _____ per gallon

- (6) In a normal dealer's operation:

(a) what percentage of annual gross sales is derived from sales of merchandise other than motor fuels or petroleum products? _____

(b) as a percentage of annual average gross receipts is necessary as net profit to remain in business? _____

- (7) Please attach separate sheets outlining terms of franchise or employment agreement between company and:

(a) Manager of company-owned and operated service station

(b) Independent dealer leasing station from company

(c) Independent dealer who owns service station

With particular attention to:

(v) Company policy on recruitment and retention of dealer organization

(w) Duration of agreement or franchise

(x) Conditions under which cancellation or termination may occur before expiration of term

(y) Discounts allowed or reduced prices offered for high volume dealers or multi-outlet purchasers

(z) Preferential treatment for particular dealers

- (8) (a) Has any dealer been involuntarily terminated or cancelled before the expiration of the term of his agreement or franchise in the past ten years? _____ Yes _____ No

If the answer is "Yes", for what reason?

(b) If an involuntary termination or cancellation occurred, was the involuntarily terminated or cancelled dealer succeeded by a company-operated dealer? _____ Yes _____ No

- (9) (a) Other than dealers involuntarily terminated or cancelled prior to the expiration of their franchises or agreements as in question (8)(a), were the franchises or agreements of any dealers not renewed upon expiration when those dealers desired to effect renewal?
_____ Yes _____ No

If the answer is "Yes", why:

(b) Were those dealers whose franchises or contracts were not renewed succeeded by company-operated dealerships? _____
Yes _____ No

If the answer is "Yes," please detail any differences in prices offered to successor or different requirements imposed upon successor?

- (10) On January 19, 1990, differences of as great as 14 cents a gallon on gasoline prices were noted between posted pump prices in Helena and in the Flathead Valley. What causes such differences?

- (11) On February 10, 1990, a differences of three cents a gallon on posted prices of unleaded gasoline was noted at service stations on the same block in Helena. What causes such divergence of pricing in the same neighborhood?

- (12) (a) During the past two decades, the total number of retail motor fuels outlets has declined noticeably, and only a few of the surviving dealers are full-service stations. What do you believe is the cause of this phenomenon?

(b) Does the company encourage operation of full-service stations? _____ Yes _____ No

(c) If the answer to (b) is "yes", what incentives are offered?

(d) If the answer to (b) is "no", what is the rationale for encouraging reduction of service to motorists?

SUMMARY OF RESPONSES TO QUESTIONNAIRE

The survey questionnaire circulated in February 1990 on behalf of the Joint Interim Subcommittee on Marketing of Motor Fuels failed to evoke a detailed explanation of gasoline pricing policies. Its value to the Subcommittee lies in elucidation of some of the management practices that prevail throughout the oil industry. The following summary was compiled at the request of the Subcommittee to present in a single document the information contained in responses that were couched in diverse forms.

CONOCO

Since selling all company-owned assets to individual businessmen prior to 1978, Conoco has no company-owned, dealer-owned, or franchised retail operations in Montana. Conoco operates in this state through wholesale jobbers only and has no contractual or supply arrangements directly with retailers.

Because all agreements are between jobbers and dealers only, Conoco prescribes no conditions at the dealer level.

Because of its noninvolvement in retail operations in Montana, Conoco provided no helpful information on the status of dealer relations except the general comment that any attempt to regulate prices would tend to increase prices and prove detrimental to consumers.

SINCLAIR

Despite operating refineries in Sinclair, Wyoming, Casper, Wyoming, and Tulsa, Oklahoma, Sinclair Oil Corporation owns no facilities in Montana. Because there is no pipeline connection from its Wyoming plants, all products sold in Montana under the Sinclair brand are obtained from refineries in this state through bulk purchase or exchange.

During the 1980s, the number of stations owned and operated by Sinclair in Montana decreased to five, but during that decade the amount of product supplied by the company to independent jobbers and wholesalers in Montana increased eight-fold. The vast majority of Sinclair stations in Montana are independently owned and operated.

Sinclair reiterates recognition of its obligation to treat fairly its dealers and maintains that engaging in pricing practices harmful to its independent marketers-customers would be counterproductive to its marketing approach.

CHEVRON

From 107 outlets in 1975, the marketing organization of Chevron USA, Inc., in Montana decreased to 66 stations in 1988. In 1975, the retailers' facilities carrying the Chevron emblem included 64 company-owned, leased to dealers; 34 dealer-owned, franchised; and seven supplied by Chevron jobbers. In 1988, all 66 Chevron stations were supplied by Chevron jobbers, wholesale distributors who resell gasoline purchased from Chevron.

Prices paid for unleaded regular gasoline by Chevron jobbers in Montana on January 31, 1990, ranged from a low of 61.3 cents a gallon at Cut Bank to 64.3 cents at Glendive. Other prices were 61.7 at Billings, 62.3 at Missoula, 63.6 at Helena and Bozeman, and 64.0 at Great Falls.

The average gross margin necessary for a dealer to survive depends on sales volume, station type, and prevailing operating costs in the area. An average weighted gross margin could run from eight to nine cents a gallon for a high volume self-service food mart station to 16 to 17 cents a gallon for a conventional service station with split-island operation, which would largely reflect higher gross margins (30 cents a gallon or more) on full-service sales. At a conventional station with service bays, about 25 percent of sales is derived from sales of merchandise other than motor fuels or petroleum products; the percentage is somewhat smaller at a food mart station.

For a conventional station, a typical markup on labor for automotive services is 100 percent and on tires, batteries, and accessories 25 percent. Typical markup on convenience store items is 40 percent.

The manager of a company-operated station is a salaried employee. Frequently, instead of operating a company-operated station directly with its own employees, Chevron enters into a contract with a manpower supplier to provide people to operate the station.

In relationships between Chevron and lessee dealers, the rents charged by Chevron are quite low compared to rents typically charged for commercial properties of similar value because rent is an element of competition among oil companies. The rents nationwide do not cover Chevron's out-of-pocket expenses for taxes, maintenance, and rents paid to third parties and allow nothing for depreciation or return on capital investment.

Some owner-dealers, but not all, may receive discounts of one to one and one-half cents a gallon to meet a specific competitive offer from another supplier. Those discounts reflect the fact that the dealer has the major capital investment in the location and does not have the benefit of the low rent enjoyed by lessee dealers.

A small part of the difference in street prices between Helena and Kalispell may represent the tank truck freight cost from Missoula to locations in the Flathead Valley. Higher operating costs may also be a factor. Gasoline prices are primarily functions of competition rather than costs, and the

competitive environment may simply be different in Helena than in the Flathead.

Price differences of three cents a gallon at dealers in the same block are common nationally. The lower price may be set to attract maximum volume, while the other dealer accepts lower volume for a higher per-gallon return. Some consumers would rather pay higher prices than cross the street; some patronize only stations of a particular brand; to some customers, the appearance of the station is of utmost importance; to others, appearance is not a concern.

CENEX

Company-owned and company-operated Cenex retail outlets totaled 19 in 1985-86 and 23 in 1988, including two that competed with dealer-owned or dealer-leased stations in the same community.

Price of unleaded regular gasoline delivered to dealers in Great Falls on January 31, 1990, was 94.2 cents a gallon, and the street price was 99.9 cents.

Something over five cents a gallon, probably more like nine to ten cents, is estimated as the gross margin needed by an independent dealer to recover operating and overhead expenses and to generate survival profit, which requires a net profit of from two to five percent of gross receipts.

Convenience stores and service-type facilities typically generate 30 percent to 40 percent of sales from nonpetroleum merchandise. Managers of Cenex dealerships work on a salary basis.

Price variations at locations within Montana are attributable to a variety of factors, including: (1) transportation costs; (2) marketing mentality and margin requirements; (3) interpretations of "who is the competition" and protection of market share; and (4) use of gasoline as a promotional item to draw traffic into the store.

Differences in prices at neighboring stations in the same locality are attributable to: (1) full-service versus self-service; (2) varying margin requirements for new facilities and fully depreciated facilities; (3) multiple profit centers (i.e., car wash, fast lube, convenience store, service bays) versus single-profit center (i.e., self-serve only); (4) timing on price moves; and (5) charge price versus cash price.

Reasons for the decline in the number of full-service stations in recent years include: (1) consumer resistance to the price for limited service on the island; and (2) changes in automobile technology that forced service shops to become specialty shops and pay commensurate salaries and that virtually eliminated the inexpensive shop man who could service the island traffic.

Cenex encourages full-service operations, but no incentives are offered to dealers to provide such services. Full-service facilities are encouraged in communities that will support the operation. Each community is surveyed to determine market voids for opportunities to provide a needed service and to generate an acceptable return on the investment.

EXXON

All Exxon brand motor fuel sold in Montana is marketed through independent distributors; Exxon does not operate service stations in this state with its own employees.

Branded Exxon outlets in Montana totaled 142 in 1975 and 188 in 1988.

The increase in self-service stations without automotive service facilities is not regarded as harmful to the consumer because: (1) the demand for automotive repairs has fallen; and (2) the availability of nonservice repair facilities has increased. Coupled with the increase in the number of do-it-yourselfers and the longer recommended service intervals on newer vehicles, these factors have reduced the need for service stations with repair facilities.

A change in the marketing of automotive services and repairs across the nation has resulted in national chains, such as Sears and K Mart, featuring maintenance and repairs. Specialty repair shops, such as Firestone, Goodyear, Midas, Brake-Check, and AAMCO, have expanded into various aspects of the repair business. The traditional new car dealers' maintenance and repair services also compete for the service and repair business. The total number of service bays available at all types of vehicle service facilities increased from 973,700 in 1979 to 981,300 in 1983, the last year for which those statistics are available, according to the Automotive Parts and Accessories Association. The American Petroleum Institute determined that from 1980 to 1985, the number of such facilities nationwide rose from 292,000 to 307,000. It is reasonable to believe that the availability of such services in Montana is similar to the nation as a whole.

ASHLAND OIL

The parent company of SuperAmerica, Ashland Oil responded that it has no refineries or wholesale customers or retail dealers in Montana, other than SuperAmerica, which sells at retail through 22 company-operated locations. SuperAmerica purchases gasoline and diesel fuel at various refineries and terminals. SuperAmerica employs 275 full-time and part-time workers, and most of its stores operate around the clock. Because SuperAmerica has been informed by the Montana Attorney General that it is one of the marketers targeted in an investigation into pricing practices, the company declined to answer the survey questions.

ANONYMOUS RESPONSE

(Left on staff table without identification at March 27 meeting)

As an independent dealer leasing his station from a wholesaler, he signed a franchise agreement with Sinclair for the sale of Sinclair brand gasoline and negotiated an independent lease for the building and real estate. The franchise is for one-year duration. He has recently completed a five-year lease and has negotiated a subsequent 20-year lease. The franchise agreement may be terminated by mutual agreement or by Sinclair upon violation by the dealer. The most serious violation would be sale of a competitive gasoline under the Sinclair brand, which would violate federal law as well as the franchise. The dealer has some protection under the federal Petroleum Marketing Practices Act.

The cost of unleaded regular gasoline delivered to the dealer-leased station on January 31, 1990, was 96 cents a gallon, and the station's selling price that day was 99.9 cents.

Gross margin needed for survival is 7.5 to 8 cents a gallon. In that dealer's operation, gasoline sales comprised 80 percent of volume. Net profit necessary to remain in business is estimated at 3 to 3.5 percent.

On January 31, major company stations were selling gasoline at the street price of 95.9 cents a gallon, which equaled this dealer's cost.

The reason for the decline in the number of full-service stations is the change in consumer buying habits. As the price increased, consumers began looking for lower prices offered by self-service stations. By eliminating jobs and lowering wages, stations were able to pass the savings on to the customers in the form of lower prices.

The company does not encourage operation of full-service stations. Instead, this dealer believes Sinclair will brand any station anywhere on the theory that the more outlets, the more sales. As a retailer, he has no protection against Sinclair opening competing outlets.

**MARGINS ON LOWEST SELLING PRICES
OF MOTOR FUELS IN REPRESENTATIVE TOWNS**

As Compiled in April 24, 1990,
Statewide Telephone Survey of Dealers
In Cooperation With Montana Petroleum Dealers Association
And Automotive Trades of Montana

\$ Per Gallon of Motor Fuel

	<u>Regular</u>	<u>Unleaded</u>	<u>Diesel</u>
Billings	.0744	.0844	.0831
Bozeman	.0554	.0654	.0821
Butte	.0718	.0818	***
Choteau	.0738	.0738	-.0084
Culbertson	.1249	.1249	.0754
Cut Bank	.0754	.0854	.0706
Deer Lodge	.0838	.0838	.0554
Drummond	.1328	.1328	.0884
Glasgow	.0598	.0598	.1181
Glendive	.0539	.0539	.1071
Great Falls	.0054	.0154	.0256
Hamilton	.1137	.1137	.1095
Hardin	.0847	.0947	.0620
Havre	.0300	.0300	.0466
Helena	-.0146	-.0146	.0786
Kalispell	.0680	.0780	.0216
Laurel	.0844	.0944	.0751
Lima	.1789	.1889	.1803
Livingston	.0498	.0598	.0857
Malta	.0778	.0878	.0523
Miles City	.0573	.0573	.0802
Missoula	.0734	.0734	.0806
Polson	.0289	.0289	.0340
Shelby	.1098	.1198	.0142
Sidney	.0533	.0633	.0849
Thompson Falls	.1114	.1214	.0155
West Yellowstone	.1564	.1664	.1704
Whitefish	.0647	.0747	.0479
Wisdom	.1859	.1959	.1992
Wolf Point	.0729	.0829	-.0070

Average Margin Needed for Profitability:*

Per Gallon of Motor Fuel

Full Service: .173

Convenience Store: .090

Truck Stop: .100

Other Retail Outlet: .080

*As Determined in May 1990 Mail Survey
of Selected Montana Dealers

*Example of Survey Questionnaire Circulated to Selected
Motor Fuels Dealers in May 1990*

COSTS SURVEY OF MOTOR FUELS MARKETERS

Please insert the information requested below

- (1) How many retail outlets selling motor fuel do you own and operate in Montana?

FULL SERVICE
STATIONS _____

CONVENIENCE
STORES _____

TRUCK
STOPS _____

OTHER RETAIL OUTLETS
WITH MOTOR FUELS _____

- (2) After deducting the profit generated by non-fuel sales (such as groceries, TBA sales, repair work, video rentals, etc.) what is the average margin per gallon required on fuel sales to reach a break-even point in your retail operations.

FULL SERVICE
STATIONS _____

CONVENIENCE
STORES _____

TRUCK
STOPS _____

OTHER RETAIL OUTLETS
WITH MOTOR FUELS _____

RESPONDENT'S NAME _____

AVERAGE PER GALLON MARGINS REPORTED
BY GASOLINE DEALERS

As Compiled from Returns in May 1990 Survey

\$ Per Gallon

Regular Gasoline

	Margin Reported <u>4/24/90</u>
Billings	.0744
Bozeman	.0554
Butte	.0718
Choteau	.0738
Culbertson	.1249
Cut Bank	.0754
Deer Lodge	.0838
Drummond	.1328
Glasgow	.0598
Glendive	.0539
Great Falls	.0054
Hamilton	.1137
Hardin	.0847
Havre	.0300
Helena	-.0146
Kalispell	.0680
Laurel	.0844
Lima	.1789
Livingston	.0498
Malta	.0778
Miles City	.0573
Missoula	.0734
Polson	.0289
Shelby	.1098
Sidney	.0533
Thompson Falls	.1114
West Yellowstone	.1564
Whitefish	.0647
Wisdom	.1859
Wolf Point	.0729

Unleaded Gasoline

	Margin Reported <u>4/24/90</u>
Billings	.0844
Bozeman	.0654
Butte	.0818
Choteau	.0738
Culbertson	.1249
Cut Bank	.0854
Deer Lodge	.0838
Drummond	.1328
Glasgow	.0598
Glendive	.0539
Great Falls	.0154
Hamilton	.1137
Hardin	.0947
Havre	.0300
Helena	-.0146
Kalispell	.0780
Laurel	.0944
Lima	.1889
Livingston	.0598
Malta	.0878
Miles City	.0573
Missoula	.0734
Polson	.0289
Shelby	.1198
Sidney	.0633
Thompson Falls	.1214
West Yellowstone	.1664
Whitefish	.0747
Wisdom	.1959
Wolf Point	.0829

Diesel Fuel

	Margin Reported <u>4/24/90</u>
Billings	.0831
Bozeman	.0821
Butte	***
Choteau	-.0084
Culbertson	.0754
Cut Bank	.0706
Deer Lodge	.0554

Drummond	.0884
Glasgow	.1181
Glendive	.1071
Great Falls	.0256
Hamilton	.1095
Hardin	.0620
Havre	.0466
Helena	.0786
Kalispell	.0216
Laurel	.0751
Lima	.1803
Livingston	.0857
Malta	.0523
Miles City	.0802
Missoula	.0806
Polson	.0340
Shelby	.0142
Sidney	.0849
Thompson Falls	.0155
West Yellowstone	.1704
Whitefish	.0479
Wisdom	.1992
Wolf Point	-.0070

**MOTOR FUELS DEALERS'
BREAK-EVEN MARGIN REQUIREMENTS**

Source: Responses to mail survey, May 1990, of selected representative dealers throughout Montana

Full Service Stations:

Convenience Stores:

\$ Margin Needed	No. of Stations
.073	1
.080	1
.100	6
.120	2
.146	1
.148	3
.150	3
.160	1
.200	2
.260	2
.300	5

\$ Margin Needed	No. of Stations
.050	1
.053	1
.055	1
.059	1
.060	3
.068	3
.070	1
.076	4
.080	2
.083	4
.084	1
.085	4
.100	34
.120	3
.128	2
.150	2

.173 Average

.090 Average

Truck Stops:		Other Retail Outlets	
<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>	<u>\$</u> <u>Margin</u> <u>Needed</u>	<u>No. of</u> <u>Stations</u>
.060	1	.060	6
.070	1	.070	4
.078	1	.080	5
.080	1	.100	8
.104	1	.110	1
.110	1	.118	2
.150	2		
.100 Average		.080 Average	

[Through June 8 returns]

EXAMPLES OF GASOLINE DEALER PROTECTION LAWS

Under House Joint Resolution No. 12, the Joint Interim Subcommittee on Marketing of Motor Fuels is requested "to determine if there exist discriminatory or predatory systems of pricing or motor fuel franchise agreements" and if so "to prepare legislation to remedy the problem".

This section and the subsequent Comments on the Implementation of Selected States' Gasoline Dealers' Bills of Rights or Similar Laws illustrate how several other states have attempted to solve similar problems. The frank opinions of officials in Alabama, Georgia, Maryland, Tennessee, Utah, and Washington are knowledgeable assessments of the effectiveness of the legislative remedies.

At least six states have enacted legislation intended to assure equitable competitive positions for independent motor fuel retailers. A review of the laws in those six states reveals many similarities in their provisions. But effective implementation of those laws has not been achieved, according to the appraisals of concerned state officials.

An underlying premise of the laws is that subsidization of retail prices at outlets owned or controlled by vertically integrated companies that use profits from their other activities to support below-cost sales contributes to unfair competition.

Accordingly, the laws attempt to discourage discriminatory pricing systems under which a particular retailer, perhaps because of affiliation with the supplier or for other reason, is charged less for motor fuel than his competitors.

In addition to declaring illegal any sale the effect of which is to injure competition, the laws usually require disclosure of transfer price (i.e., the price at which a refiner or supplier transfers product to subsidiaries or related entities).

The necessity to meet price reductions made in good faith is recognized, and the laws generally allow a retailer to meet low prices posted by a competitor in the same market field.

Some of the statutes are intended to prohibit below-cost selling. Others seek to preserve the rights of independent operators of franchise locations. Regardless of the focus, however, the laws generally outline the financial rights and privileges of retail dealers and guarantee the entrepreneurial independence of those business people.

The laws recognize that judgment of the fairness of the posted prices of motor fuel must take into account possible differences in costs attributable to varying charges for transportation, advantages of quantity buying, and other legitimate economic factors.

Officials of other states contacted by the committee staff were unanimous in their agreement that the structure of the petroleum industry--ranging from world-wide integrated corporate behemoths to local service stations--offers opportunities for inequities. The intention of the laws, however, is to balance the scale toward the hometown entrepreneur.

The experience of those officials, without exception, convinces them that the laws currently on the books fall short of effectively protecting the independent operator for one very important reason: all rely upon the right of private action for enforcement. In practically every instance, the state has no--or a very limited--role in enforcement.

Following are the salient features of the pertinent laws of Alabama, Georgia, Maryland, Tennessee, Utah, and Washington:

ALABAMA

Motor Fuel Marketing Act, §8-22-1 through 8-22-18, Code of Alabama

The Legislature found that unfair competition occurs when costs of marketing motor fuels are recovered from other operations. Such subsidization occurs when refining profits cover below normal or negative marketing returns, when a multilocation marketer uses profits from one location to cover losses from another, or when nonmotor fuel profits cover losses from below-cost selling of motor fuel. Subsidized pricing is inherently predatory and reduces competition.

Declared to be an unfair and deceptive trade practice is the sale of motor fuel below cost or at a lower cost than that charged to other persons on the same marketing level with the intent of injuring competitors.

Required is the disclosure by the seller of transfer prices on each grade of motor fuel transferred or sold to itself or to an affiliate for resale at another marketing level.

Sales price variations attributable to differences in shipping methods, transportation, marketing, or quantity, or a price set in good faith to meet a competitor's low price do not violate the law.

Declared illegal is:

- the sale of motor fuel at wholesale or retail where the effect is to injure competition;

- the offering of a rebate or concession of any kind in connection with the sale of motor fuel with the intent to injure competition; or
- an attempt by a retailer to induce a wholesaler to sell motor fuel at less than cost.

If motor fuel is offered for sale in combination with other items, the selling price may not be lower than the cost of all articles included in the transaction.

The penalty for violation of the law is a maximum civil fine of \$10,000 for each offense.

GEORGIA

Gasoline Marketing Practices Act, §106-1101 [10-1-230] through 106-1112 [10-1-239], Code of Georgia Annotated

This act makes it illegal for a gasoline distributor who has a marketing agreement with a gasoline dealer to:

- terminate the marketing agreement without good cause prior to the expiration date;
- coerce the dealer to sell exclusively the distributor's products;
- fix retail prices;
- require or prohibit, without good cause, any change in management;
- require operation longer than six days a week or more than 12 hours a day.

The distributor is required to sell gasoline for resale to all dealers under the same prices, terms, and conditions.

MARYLAND

Gasohol and Gasoline Products Marketing Act, §11-301 through 11-308, The Annotated Code of the Public General Laws of Maryland

Before any marketing agreement is concluded, a distributor must disclose:

- any gallonage history of the location for three years and the name and address of the previous dealer;
- any commitment for the sale, demolition, or other disposition of the location;
- any training program and any specific goods or services that will be provided;
- any obligation that will be required of the dealer; any

restriction on the sale, transfer, and termination of the agreement; and

- the total amount of cash deposit required, the amount of interest to be paid on the deposit, and conditions for the return of the deposit.

A marketing agreement is cancelable by the dealer until midnight of the seventh day following signing. The distributor may not set the dealer's prices or business hours or require that the dealer participate in promotions.

The distributor must give 90 days' prior notice of his intention not to renew at the expiration of a marketing agreement.

The distributor may not unreasonably withhold consent for assignment of a marketing agreement.

Upon termination or cancellation of a marketing agreement, the distributor must repurchase from the dealer at the current wholesale price all merchantable products purchased from the distributor and pay the dealer the full value of any business goodwill attaching to the dealership.

A distributor who sets the retail price of gasoline through controlled outlets must provide product to those noncontrolled outlets that it supplies with gasoline at a wholesale price that is at least four cents a gallon below the lowest price posted for each grade of gasoline at any controlled outlet.

A franchise is personal property and must devolve on death or retirement of a service station dealer to a designated successor in interest of the dealer.

§157E. The Annotated Code of the Public General Laws of Maryland

A producer or refiner of petroleum products is prohibited from opening a service station after July 1, 1974, and from operating it with company personnel, a subsidiary company, commissioned agent, or under a contract with any manager on a fee arrangement. The station must be operated by a retail service station dealer.

After July 1, 1975, no producer or refiner may operate a service station. After July 1, 1979, a retail service station operated by a subsidiary of a producer or refiner on that date may be exempt from year to year from this provision for the next year if the subsidiary's gross revenues from the sale of petroleum products in the state for the preceding calendar year was less than two percent of its gross revenues from all retail operations in the state.

A producer, refiner, or wholesaler of petroleum products must, with respect to all retail service station dealers supplied:

- uniformly extend all voluntary allowances;
- uniformly apply all equipment rentals; and
- equitably apportion all gasoline and special fuels to all retail service station dealers during periods of shortages.

TENNESSEE

Petroleum Trade Practices Act, §47-25-601 through 47-25-626, Tennessee Code Annotated

The purpose of this law is to regulate vertical integration of the petroleum industry, and to do so, the act pronounces subsidized pricing a form of predatory pricing, inherently unfair and destructive to competition in the motor fuel marketing industry.

It is a violation of the law if, through the use of price or service discrimination, a vertically integrated producer terminates the franchise agreement of a dealer who has operated for a year or longer and converts the premises into a producer-operator facility within two years. A court may grant the aggrieved dealer damages three times the value of the franchise agreement, plus the reasonable value of the dealer's good will.

If the effect is to injure or destroy competition, sales at below cost to the retailer are prohibited. No dealer may limit or refuse to make sales at retail in 100-gallon or larger containers to another dealer at the same or lower price as advertised if the advertised price is below cost to the retailer.

A franchisor must inform any prospective franchisee, regarding the location under negotiation, of:

- the gallonage volume history for three years;
- projections of gallonage consumption that the franchisor used to invest in the location;
- the name and address of the previous dealer;
- any commitments for the sale, demolition, or disposal of the location;
- training programs and specific goods and services the supplier will provide with or without cost; and
- full disclosure of all obligations that will be required of the dealer.

A franchisor may not fix prices for any product and may not refuse without good cause to consent to the assignment of the franchise agreement. Upon the death of the franchisee, the surviving spouse or adult children will have first right of refusal to become the new franchisee.

Any cash deposit required in the franchise agreement must be held by the franchisor who may use the deposit in his business. Interest of at least six percent a year must be paid to the franchisee at least annually. Upon termination of the agreement, the deposit, less any amount owed by the franchisee, must be returned with accrued interest within 90 days.

Discrimination in prices between purchasers of petroleum products of like grade and quality is prohibited. A refiner, distributor, or producer of petroleum products must provide, upon request, a schedule of dealer tank

wagon prices charged to dealers for motor fuel.

UTAH

Gasoline Products Marketing Act, §13-12-1 through 13-12-8, Utah Code Annotated

A refiner or distributor--meaning a person engaged in the refining of gasoline or motor fuels who is engaged in the sale, consignment, or distribution of gasoline through retail outlets that it owns, leases or otherwise controls--may not:

- prohibit the right of free association among dealers;
- set the business hours of a dealer unless those hours are stated in the marketing agreement;
- fix a dealer's selling prices;
- require a dealer to participate in any sales promotion; or
- except for good cause prescribed in the act, terminate a dealer without 90 days' written notice.

A dealer has the right to cancel his marketing agreement until midnight of the seventh day after he signs the agreement.

Upon the death of a dealer or lessee, the distributor must cooperate with the heirs or successors by offering to repurchase salable merchandise and equipment owned by the dealer at fair market value up to the original invoice price and by permitting heirs or successors reasonable access to the premises.

If a distributor discontinues business in the state during the term of the marketing agreement, he must repurchase salable merchandise at a fair wholesale market value not greater than the original invoice price.

Motor Fuel Marketing Act, §13-16-1 through 13-16-9, Utah Code Annotated

Each refiner must establish and disclose, upon request, its transfer price, which is the price used by a refiner in transferring motor fuel to itself or an affiliate for resale at another marketing level.

A sale below cost or at a price lower than the seller charges other persons at the same time and on the same level of distribution is prohibited if the intent or the effect of the sale is to injure competition.

Cost is defined as:

- the lowest invoice cost that the seller charged to the purchaser within 15 days before the alleged unlawful resale if the motor fuel is not purchased from an affiliate or the lowest

transfer price that the affiliate charged to the purchaser or receiver in the 15 days before the alleged unlawful resale if the motor fuel is purchased or received from an affiliate;

- the reasonable cost of doing business as determined by generally accepted accounting principles, which in the absence of proof of a lesser cost, is presumed to be a margin of 6 percent of the posted retail price;
- plus, in each case, freight charges and all taxes not included in the invoice cost or transfer price.

A refiner may not sell or transfer motor fuel to itself or an affiliate for resale on a different marketing level of distribution at a sale price or a transfer price lower than the price it charges a person who purchases for resale at the same time and on the same level of distribution if the intent or effect is to injure competition.

Not unlawful is a difference in transfer price or sales price or a sale below cost that is due to:

- the difference in shipping method, transportation, marketing, sale, or quantity in which motor fuel is sold; or
- a good faith effort to meet the equally low price of a competitor.

A purchaser of motor fuel for resale may get a court order to require the marketer to provide the sale price or the transfer price at which he transfers motor fuel to each level of distribution and to provide information on all discounts or rebates.

WASHINGTON

Gasoline Dealer Bill of Rights Act, §19.120.010 through 19.120.905, Revised Code of Washington Annotated

A motor fuel refiner-supplier may not, without fairly compensating the retailer, absolutely prohibit or unreasonably withhold its consent to the transfer of a motor fuel franchise to a third party.

The interest of a motor fuel retailer in a franchise is considered personal property and devolves on the death of the retailer to a designated successor in interest, limited to the retailer's spouse, adult child, or adult stepchild.

A motor fuel retailer has the right of first refusal to purchase the franchise location owned by the refiner-supplier prior to any sale.

A motor fuel supplier may not:

- require a retailer to meet mandatory minimum sales volume requirements unless the supplier proves that its price to the

retailer is sufficiently low to enable the retailer to meet the minimum; or

- set the price at which the retailer sells motor fuel.

Except for the initial inventory of the franchise, a motor fuel supplier may not:

- require a retailer to purchase or lease goods or services from the supplier or from approved sources;
- discriminate between retailers in charges; or
- sell or rent to a retailer any product or service for more than a fair and reasonable price.

COMMENTS ON THE IMPLEMENTATION OF SELECTED STATES' GASOLINE DEALERS' BILLS OF RIGHTS OR SIMILAR LAWS

To determine the effectiveness of motor fuel dealers' protective legislation previously enacted elsewhere, the staff conducted telephone interviews with persons familiar with those states' statutes. The calls were made between May 10 and May 18, 1990. As a generalization, the conclusion was that the existing statutes fell far short of achieving their objectives. Two reasons cited most often for the laws' inability to reach their goals were the absence of enforcement mechanisms other than civil penalties and the reluctance of lawmakers to provide executive departments with adequate resources to administer the provisions of the laws.

Summaries of the responses to the staff's inquiries follow:

ALABAMA

Motor Fuel Marketing Act: The law is ineffective because the statute provides no enforcement mechanism. It only assures the right of private action to an aggrieved party. Enforcement lies in a civil lawsuit. Successful enforcement depends upon the ability of the plaintiff's attorney in relationship to that of the defense counsel. No enforcement action has ever been taken by the state. If any legislation is proposed it should include some teeth.

GEORGIA

Gasoline Marketing Practices Act: The Attorney General's Office has not worked with this law, and no opinions or rules applying to it have been issued. Enforcement lies entirely in the right of private action. As far as the Attorney General's staff knows, no one in state government is concerned with this law.

MARYLAND

Gasohol and Gasoline Products Marketing Act: The law includes no provision for governmental enforcement; it depends on the right of private action only. The chief of the antitrust division and counsel for the Comptroller of the Treasury is not aware of any action under this law. Sections 11-401, the sales below cost law, and 11-304(l), which require sales made by a producer who operates a service station to a competing retail dealer to be four cents below the retail price at the producer's station, would be the enforcement provisions, if necessary. However, the four-cent law has never been operative because of the effect of Section 56-157(e), the divestiture law passed in 1974, which prohibits a refiner or producer from operating service stations. The constitutionality of the divestiture law was upheld by the United States Supreme Court in 1978.

TENNESSEE

Petroleum Trade Practices Act: There has been no enforcement effort on the part of state government because the Act guarantees private right of

action and because enforcement would require tremendous resources to prove unfair low pricing with intent to injure competition. A successful prosecution would require proof of a substantial impact on competition, accomplishment of which is uncertain. At a location serving traffic on an interstate highway, for instance, a trial judge would probably rule that the area of competition extends for 200 miles and involves scores of participants. No resources are available to conduct an investigation of this scope. The objectives of the law are unclear, and the situation is confused by the changing nature of the industry. The mixture of types of operators in the retail business is vastly different today than it was 25 years ago. Is it a reasonable marketing technique or unfair competition for a convenience store to offer low-cost gasoline to attract customers to its profitable nonpetroleum merchandise? There are two possible solutions:

- (1) create a state gasoline pricing commission to establish minimum prices in various areas of the state with statutory penalties for selling below floor price; or
- (2) put the burden on the gasoline retailer to prove he is selling above cost. Inability to provide that proof will trigger a punitive tax that will negate any desire to engage in such practices.

Each of these possible remedies imposes costs and duties upon government and puts government in an intrusive position in the market.

UTAH

Gasoline Products Marketing Act and Motor Fuel Marketing Act:

These laws prohibit below-cost sales. Several actions have been brought under these laws and were immediately challenged. After being tied up in court for more than three years, the cases still are not settled.

The concept of the laws is excellent. This kind of protection is necessary for the small dealer. The difficulty is in obtaining valid investigative material; it is almost impossible to get solid evidence. There are no high hopes for settling any cases quickly.

The situation is tantamount to predatory pricing.

The law allows defense if the price is dropped to avoid injury (i.e., to meet competition). The problem is to determine who lowered the price first because all price changes usually happen in a matter of minutes.

A few years ago, a case was lost when a judge found the law unconstitutional because it did not require showing of injury. The law has been changed to require proof of injury. When that law went to the Supreme Court, the ruling was that proof of injury was not needed in first place. The changed law now increases the problem of enforcement.

Because of difficulty in proving who makes the first price reduction, the hope now is to get the law amended to say that the price is lawful if the price is at least 6 percent above cost.

Three lawsuits are being prepared as tests:

One will allege only below-cost sales, one will be a test of tied sale (car wash with fill-up), and one will be against several retailers and will let the judge determine who reduced the price first.

Enforcement of the Utah law is hampered because the legislature did not provide sufficient resources for administration. A real problem of low-cost selling exists. Major oil companies are either encouraging low-cost sales or are quick to seize the opportunity to slash prices under the guise of lawfully meeting competition whenever a small retailer reduces prices, even temporarily, such as to meet a need to generate sales to accumulate cash to cover an immediate emergency. If the major companies follow the price reduction, they often keep the price down long after the originator of the decline has restored his margin. To remedy this situation, the Gasoline Products Marketing Act should be amended to include the language used in the Utah antitrust law: a price decrease is allowable to meet the "lawful price" of a competitor. Or instead of allowing a price reduction to "meet in good faith", the language in the law could be changed to allow a change by a branded station to meet competition only from another branded station, recognizing that an unbranded station is not in direct competition with a branded station because they often serve different market segments. A method should be found to allow a branded dealer to meet branded competition and an unbranded dealer to meet unbranded competition.

WASHINGTON

Gasoline Dealer Bill of Rights Act: The Attorney General's Office has had almost nothing to do with implementation of this law under which dealers themselves must bring actions. The office has avoided below-cost litigation because of the near impossibility of determining when sales are truly at less than dealer cost. A statewide survey of three major companies at the time of the enactment of the law in 1986 looked at thousands of situations and found virtually no example of provable below-cost sales. Many dealers, especially those associated with or controlled by major companies, were found to be operating on very slender margins, but none was actually selling at less than cost. Winning a lawsuit based on these situations would require very complex and difficult analysis.

Washington's law doesn't directly address below-cost selling, yet pricing is certainly a consideration in predatory franchising. The Legislature is continuing to look at pricing by contracting with the state energy office to conduct a continuing survey (at a cost so far of about \$125,000) gathering facts on sources of supply, costs, and pricing. Through this means, current information is always available without relying on dealers. The State of Washington exemplifies two differing marketing situations: the eastern half of

APPENDIX A

Proposed Legislation

1 of income. The legislature believes that subsidized,
2 below-cost pricing is a predatory practice that is
3 not conducive to fair trade. The legislature finds
4 that below-cost pricing laws are effective in
5 protecting independent and small retailers and
6 wholesalers in other jurisdictions from subsidized
7 pricing, which is inherently unfair and destructive,
8 reduces competition in the motor fuel marketing
9 industry, and is a form of predatory pricing. The
10 purpose of [sections 1 through 7] is to prevent and
11 eliminate predatory pricing of retail motor fuel.

12

13 NEW SECTION. Section 3. Definitions. As used in
14 [sections 1 through 7], unless the context requires
15 otherwise, the following definitions apply:

16 (1) "Affiliate" means a person who, other than
17 through a franchise or marketing agreement,
18 controls, is controlled by, or is under common
19 control with any other person.

20 (2) "Cost of doing business", in the absence of
21 proof of lesser cost, is 3% of the delivered cost of
22 motor fuel for wholesale sales and 6% of the
23 delivered cost of motor fuel for retail sales and in
24 other cases includes all costs incurred in the
25 conduct of business, including but not limited to:

26 (a) labor, including salaries of executives and

Proposed Legislation

1 officers;

2 (b) rent that is not less than the fair market
3 value based on current use;

4 (c) interest on borrowed capital;

5 (d) depreciation;

6 (e) selling cost;

7 (f) maintenance of equipment;

8 (g) losses due to breakage or damage;

9 (h) credit card fees or other charges;

10 (i) credit losses; and

11 (j) all licenses, taxes, insurance, and
12 advertising.

13 (3) "Customary discount for cash" means an
14 allowance, whether part of a larger discount or not,
15 made to a wholesaler or retailer when a person pays
16 for motor fuel within a limited or specified time.

17 (4) "Delivered cost of motor fuel" means:

18 (a) for a distributor or retailer, the lower of
19 the most recent cost of motor fuel to the
20 distributor or retailer or the lowest replacement
21 cost of motor fuel to the distributor or retailer
22 within 5 days prior to the date of sale, in the
23 quantity last purchased, whether within or before
24 the 5-day period, less all trade discounts except
25 customary discounts for cash plus transportation
26 costs and any taxes that may be required by law if

Proposed Legislation

1 not already included in the invoice cost; or

2 (b) for a refiner, that refiner's posted rack
3 price to the wholesale class of trade at the
4 terminal used by the refiner to obtain the motor
5 fuel plus transportation costs and any taxes that
6 may be required by law. If the refiner does not
7 regularly sell to the wholesale class of trade at
8 the terminal or does not post a terminal price, the
9 refiner may use as its rack price the posted price
10 of any other refiner that has products readily
11 available for sale to the wholesale class of trade
12 at a terminal within the general trade area.

13 (5) "Distributor" means a person engaged in the
14 purchase of motor fuel for resale to a retail motor
15 fuel outlet.

16 (6) "Motor fuel" means gasoline, as defined in
17 15-70-201, alcohol blended with gasoline to produce
18 gasohol, and special fuel, as defined in 15-70-301.

19 (7) "Person" means an individual, a sole
20 proprietorship, a partnership, a corporation, any
21 other form of business entity, or an individual
22 acting on behalf of any of them.

23 (8) "Posted rack price" means the f.o.b. terminal
24 price for a particular motor fuel at which a
25 refiner, producer, or person offers motor fuel for
26 sale or transfer to itself or any related or

Proposed Legislation

1 unrelated person.

2 (9) "Refiner" means a person engaged in the
3 production or refining of motor fuel, whether the
4 production or refining occurs in this state or
5 elsewhere, and includes any affiliate of the person.

6 (10) "Retailer" means a person engaged in the
7 business of selling motor fuel at a retail motor
8 fuel outlet.

9 (11) "Retail motor fuel outlet" means a place of
10 business where motor fuel is sold and delivered into
11 the tanks of motor vehicles regardless of whether
12 the selling and delivery of the fuel is the primary
13 source of revenue of that business.

14 (12) "Sale" means a transfer, gift, offer for
15 sale, or advertisement for sale in any manner or by
16 any means of motor fuel, including a transfer of
17 motor fuel by a person to himself or to his
18 affiliate.

19 (13) "Transfer price" means the price used by a
20 person to transfer motor fuel to himself or to an
21 affiliate for resale at a retail motor fuel outlet.

22 (14) "Transportation cost" means the actual cost
23 of transportation of motor fuel or, in the absence
24 of proof of actual cost, the common carrier rates
25 fixed by the public service commission.

26 (15) "Wholesaler" means a person engaged in the

Proposed Legislation

1 business of making sales of motor fuel to a retail
2 motor fuel outlet.

3

4 NEW SECTION. Section 4. Below-cost sale
5 prohibited. (1) A wholesaler may not sell motor fuel
6 to a retail motor fuel outlet at less than the
7 delivered cost of the motor fuel plus the cost of
8 doing business if the effect is to injure or destroy
9 competition or substantially lessen competition.

10 (2) A retailer may not sell motor fuel at less
11 than the delivered cost of the motor fuel plus the
12 cost of doing business if the effect is to injure or
13 destroy competition or substantially lessen
14 competition.

15 (3) A wholesaler may not sell or transfer motor
16 fuel to itself or an affiliate for resale at a
17 retail motor fuel outlet at a transfer price that is
18 below cost or lower than the price the wholesaler
19 charges another retail motor fuel outlet that
20 purchases a like quantity within the same
21 competitive area if the effect is to injure or
22 destroy competition or substantially lessen
23 competition.

24 (4) The provisions of [sections 1 through 7] do
25 not apply to a sale at wholesale or a sale at retail
26 made:

Proposed Legislation

1 (a) in an isolated transaction not in the usual
2 course of business;

3 (b) if motor fuels are advertised, offered for
4 sale, or sold in a bona fide clearance sale for the
5 purpose of discontinuing trade in the motor fuel and
6 the advertising, offer to sell, or sale states the
7 reason for the sale and the quantity of the motor
8 fuel advertised, offered for sale, or to be sold;

9 (c) if the motor fuel is advertised, offered for
10 sale, or sold as imperfect or damaged and the
11 advertising, offer of sale, or sale states the
12 reason for the sale and the quantity of the motor
13 fuel advertised, offered for sale, or sold;

14 (d) if motor fuel is sold upon the final
15 liquidation of a business; or

16 (e) if motor fuel is advertised, offered for
17 sale, or sold by a fiduciary or other officer under
18 the order or direction of a court.

19 (5) Notice required under this section is not
20 sufficient unless the subject of the sale is kept
21 separate from other stocks and is clearly and
22 legibly marked with the reason for the sale and
23 unless any advertisement of the goods indicates the
24 same facts and the quantity to be sold.

25 (6) A wholesaler or retailer may advertise, offer
26 to sell, or sell motor fuel at a price made in good

Proposed Legislation

1 faith to meet the price of a competitor who is
2 rendering the same type of service and is selling
3 the same article at cost. The price of motor fuel
4 advertised, offered for sale, or sold under the
5 exceptions in subsection (4) may not be considered
6 the price of a competitor and may not be used as a
7 basis for establishing prices below cost, and the
8 price established at a bankruptcy sale may not be
9 considered the price of a competitor under the
10 provisions of this section.

11 (7) If a wholesaler sells motor fuel to another
12 wholesaler, the former is not required to include in
13 his selling price to the latter the cost of doing
14 business as defined in [section 3], but the latter
15 wholesaler, upon resale to a retailer, is subject to
16 the provisions of this section.

17
18 NEW SECTION. Section 5. Existing contracts void.
19 A contract, express or implied, made by a person in
20 violation of a provision of [sections 1 through 7]
21 is void, and no recovery may be had on the contract.

22
23 NEW SECTION. Section 6. Penalty. (1) A
24 violation of [section 4] is an unfair trade
25 practice, and upon conviction, a retailer or
26 wholesaler is subject to a civil penalty of not more

Proposed Legislation

1 than \$1,000 a day for each day that the violation
2 occurs.

3 (2) The department of commerce or a county
4 attorney may bring an action for a violation of
5 [section 4].

6
7 NEW SECTION. Section 7. Civil remedies. (1) The
8 department of commerce may issue a cease and desist
9 order requiring a wholesaler or retailer to cease
10 violating the provisions of [section 4]. The
11 department or a county attorney may commence an
12 action on behalf of the state for failure to comply
13 with an order. A civil penalty of not less than \$200
14 or more than \$5,000 may be recovered in the action.

15 (2) The department or a county attorney may
16 bring an action to enjoin a violation of [section
17 4].

18 (3) An action under this section must be
19 commenced in the county where the motor fuel is
20 sold.

21
22 NEW SECTION. Section 8. Saving clause. [This
23 act] does not affect rights and duties that matured,
24 penalties that were incurred, or proceedings that
25 were begun before [the effective date of this act].

26

Proposed Legislation

1 NEW SECTION. Section 9. Severability. If a part
2 of [this act] is invalid, all valid parts that are
3 severable from the invalid part remain in effect. If
4 a part of [this act] is invalid in one or more of
5 its applications, the part remains in effect in all
6 valid applications that are severable from the
7 invalid applications.

8
9 NEW SECTION. Section 10. Effective date. [This
10 act] is effective on passage and approval.

11

12

-END-

APPENDIX B

Proposed Legislation

1 **** Bill No. *** LC0039

2 Introduced By *****

3 By Request of the Joint Interim Subcommittee

4 On Marketing of Motor Fuels

5

6 A Bill for an Act entitled: "An Act prohibiting a
7 business from discriminating in the price charged to
8 different purchasers of commodities of like grade
9 and quality; providing a method of enforcement;
10 providing for penalties and remedies for price
11 discrimination; amending sections 30-14-219, 30-14-
12 222, 30-14-223, and 30-14-224, MCA; and providing an
13 applicability date."

14

15 Statement of Intent

16 A statement of intent is required for this bill
17 because it grants additional rulemaking authority to
18 the department of commerce.

19 Under new sections of the bill, the department
20 may adopt rules interpreting [sections 1 and 2].
21 The rules must be consistent with the regulations,
22 rules, and decisions of the federal trade commission
23 and the federal courts relating the provisions of
24 the federal Robinson-Patman Anti-Discrimination Act
25 regarding price discrimination as codified in 15
26 U.S.C. 13(b) and (c).

27

Proposed Legislation

1 Be it enacted by the Legislature of the State of
2 Montana:

3 NEW SECTION. Section 1. Discrimination in price.

4 (1) It is unlawful for a business to discriminate,
5 directly or indirectly, in the price charged to
6 different purchasers of commodities of like grade
7 and quality if the effect of the discrimination upon
8 other businesses or customers is to substantially
9 lessen competition, to create a monopoly in any line
10 of commerce, or to injure, destroy, or prevent
11 competition with any business that grants or
12 knowingly receives the benefit of the
13 discrimination.

14 (2) This section does not prohibit:

15 (a) price differentials that make due allowance
16 for the costs of manufacture, sale, or delivery
17 resulting from the differing methods or quantities
18 in which the commodities are sold or delivered to
19 the purchasers;

20 (b) businesses engaged in selling commodities
21 from selecting their own customers in bona fide
22 transactions and not in restraint of trade; or

23 (c) price changes from time to time made in
24 response to changing conditions affecting the market
25 for, or the marketability of, the commodities,
26 including but not limited to actual or imminent
27 deterioration of perishable goods, obsolescence of

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1 seasoned goods, distress sales under court process,
2 or sales in good faith in discontinuance of business
3 in the goods concerned.

4 (3) It is unlawful for a business to
5 discriminate in favor of one purchaser against
6 another purchaser of a processed or unprocessed
7 commodity bought for resale by contracting to
8 furnish, by furnishing, or by contributing to the
9 furnishing of, any service or facility connected
10 with the processing, handling, sale, or offering for
11 sale of the commodity purchased upon terms not
12 accorded to all purchasers on proportionally equal
13 terms.

14 (4) It is unlawful for a business to knowingly
15 induce or receive a discrimination in price that is
16 prohibited by this section.

17

18 NEW SECTION. Section 2. Return of net earnings
19 or surplus of cooperative association -- exemption
20 of nonprofit institution from price discrimination
21 provision. (1) [Section 1] may not be construed to
22 prevent a cooperative association from returning to
23 its members, producers, or consumers, in proportion
24 to their purchases or sales from, to, or through the
25 association, all or any part of the net earnings or
26 surplus resulting from its trading operations.

27 (2) [Section 1] does not apply to the purchase

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1 of supplies for its own use by a school, college,
2 university, public library, church, hospital, or
3 charitable institution not operated for profit.

4
5 NEW SECTION. Section 3. Federal interpretation
6 -- rules determining unfair competition and
7 deception. (1) It is the intent of the legislature
8 that in construing [sections 1 and 2], due
9 consideration and weight be given to the
10 interpretations of the federal trade commission and
11 the federal courts relating to the provisions of the
12 federal Robinson-Patman Anti-Discrimination Act
13 regarding discrimination in price that are codified
14 at 15 U.S.C. 13(b) and (c).

15 (2) The department may make rules interpreting
16 the provisions of [sections 1 and 2]. The rules may
17 not be inconsistent with the rules, regulations, and
18 decisions of
19 the federal trade commission and the federal courts
20 relating to the provisions of the federal Robinson-
21 Patman Anti-Discrimination Act regarding
22 discrimination in price that are codified at 15
23 U.S.C. 13(b) and (c).

24
25 NEW SECTION. Section 4. Burden of rebutting
26 prima facie case of discrimination. (1) In a
27 proceeding for a violation of [section 1], if proof

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1 is made that there has been discrimination in price,
2 the burden of rebutting the prima facie case by
3 showing justification is upon the person charged
4 with a violation of [section 1].

5 (2) A seller may rebut the prima facie case by
6 showing that a lower price to a purchaser was made
7 in good faith to meet an equally low price of a
8 competitor.

9

10 Section 5. Section 30-14-219, MCA, is amended to
11 read:

12 "30-14-219. Recovery on illegal contracts
13 forbidden. A contract, express or implied, made by a
14 person in violation of any of the provisions of 30-
15 14-205 through 30-14-218 or [section 1] is an
16 illegal contract and no recovery ~~thereon~~ may be had
17 on the contract."

18

19 Section 6. Section 30-14-222, MCA, is amended to
20 read:

21 "30-14-222. Injunctions -- damages -- attorney
22 fees -- costs -- production of evidence. (1) Any
23 person, if injured thereby, or the attorney general
24 may maintain an action to enjoin a continuance of an
25 act in violation of 30-14-205 through 30-14-218 or
26 [section 1] and for the recovery of damages. If in
27 ~~such~~ the action the court finds that the defendant

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1 is violating or has violated any of the provisions
2 of 30-14-205 through 30-14-218 or [section 1], it
3 shall enjoin the defendant from a continuance
4 ~~thereof~~ of the act. It is not necessary to allege or
5 prove actual damages to the plaintiff.

6 (2) In addition to ~~such~~ injunctive relief, the
7 plaintiff is entitled to recover from the defendant
8 three times the amount of actual damages sustained,
9 plus attorney fees, and costs of suit.

10 (3) A defendant in an action brought under this
11 section may be required to testify under the Montana
12 Rules of Civil Procedure. In addition, the books and
13 records of ~~any such~~ the defendant may be brought
14 into court and introduced into evidence by
15 reference. ~~No information~~ Information so obtained
16 may not be used against the defendant as a basis for
17 a misdemeanor prosecution under 30-14-205 through
18 30-14-218, ~~and~~ 30-14-224, or [section 1]."

19

20 Section 7. Section 30-14-223, MCA, is amended to
21 read:

22 "30-14-223. Department to institute suit. Upon
23 the third violation of any of the provisions of 30-
24 14-205 through 30-14-218 or [section 1] by any
25 business, the department shall institute proper
26 suits or quo warranto proceedings in a court of
27 competent jurisdiction for the forfeiture of its

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1 charter, rights, franchises or privileges, and
2 powers exercised by ~~such~~ the business and to
3 permanently enjoin it from transacting business in
4 this state. If in ~~such~~ the action the court finds
5 that the business is violating or has violated any
6 of the provisions of 30-14-205 through 30-14-218 or
7 [section 1], it shall enjoin the business from doing
8 business in this state permanently or for ~~such~~ a
9 time as the court orders or shall annul the charter
10 or revoke the franchise of ~~such~~ the business."

11

12 Section 8. Section 30-14-224, MCA, is amended to
13 read:

14 "30-14-224. Penalties. (1) Except as otherwise
15 provided in this section, a person, whether as
16 principal, agent, officer, or director, who violates
17 any of the provisions of 30-14-206 through 30-14-218
18 or [section 1] is guilty of a misdemeanor for each
19 single violation and upon conviction ~~thereof shall~~
20 must be fined not less than \$100 or more than \$1,000
21 or imprisoned for a term not to exceed 6 months, or
22 both.

23 (2) A violation of 30-14-205 is punishable by
24 imprisonment in the county jail for a period of not
25 less than 24 hours or more than 1 year or by a fine
26 not exceeding \$25,000, or both.

27 (3) When there is a violation of 30-14-216, in

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1 addition to the penalty specified in subsection (1),
2 the court before which a conviction is had shall,
3 within 10 days after judgment of conviction is
4 given, forward a certified copy of the judgment to
5 the department of agriculture and that department
6 shall revoke any license issued to the person ~~so~~
7 convicted. ~~In such case no~~ A new license may not be
8 granted to the person whose license is revoked or to
9 anyone either directly or indirectly engaged with
10 him in ~~such~~ the business for a period of 1 year."

11

12 NEW SECTION. Section 9. Codification
13 instruction. [Sections 1 and 2] are intended to be
14 codified as an integral part of Title 30, chapter
15 14, part 2, and the provisions of Title 30, chapter
16 14, part 2, apply to [sections 1 and 2].

17

18 NEW SECTION. Section 10. Saving clause. [This
19 act] does not affect rights and duties that matured,
20 penalties that were incurred, or proceedings that
21 were begun before [the effective date of this act].

22

23 NEW SECTION. Section 11. Severability. If a
24 part of [this act] is invalid, all valid parts that
25 are severable from the invalid part remain in
26 effect. If a part of [this act] is invalid in one or
27 more of its applications, the part remains in effect

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1 in all valid applications that are severable from
2 the invalid applications.

3

4 NEW SECTION. Section 12. Applicability. The
5 provisions of [this act] apply to any contract for
6 the sale or purchase of a commodity entered into on
7 or after [the effective date of this act].

8

9

-END-

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